

Newspaper and Mail Deliverers' Union of New York and Vicinity and Daily News, L.P. and New York Mailers' Union No. 6, Printing, Publishing and Media Workers Sector of the Communications Workers of America, AFL-CIO.
Case 29-CD-470

May 30, 1997

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The charge in this Section 10(k) proceeding was filed March 26, 1996, alleging that the Respondent, Newspaper and Mail Deliverers' Union of New York and Vicinity (NMDU) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by New York Mailers' Union No. 6, Printing, Publishing and Media Workers Sector of the Communications Workers of America, AFL-CIO (Mailers' Union). The hearing was held July 22 through 24, 26, and 29, 1996, before Hearing Officer Leslie A. Breeding.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Daily News, L.P., with its office and principal place of business in New York, New York, and with offices located in Brooklyn, New York, and Jersey City, New Jersey, is engaged in the publication and distribution of a newspaper. During the 12 months preceding the hearing, the Employer derived \$200,000 in gross revenues and had membership in or subscription to interstate news services or advertisements of nationally sold products, and has purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of New York. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that both the NMDU and the Mailers' Union are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer publishes and distributes a newspaper called the Daily News, which it has owned since 1993. The Employer has collective-bargaining relationships with the NMDU and with the Mailers' Union. The Employer has been in the process of gradually moving

its production and distribution departments to a new facility in Jersey City, New Jersey, also known as the "Liberty View facility." The Employer intends to close its Brooklyn facility by early 1997 and to centralize its operations at the Jersey City facility.

On March 25, 1996,¹ the Employer for the first time attempted to produce from its Jersey City facility its "Country" edition, which had previously been produced from the Brooklyn location.²

In the Employer's Brooklyn facility, newspapers emerged from the printing presses, moved to the mailroom along a conveyor belt, which took them to a stacking machine and then to a wire machine (also called a tying machine and a strapping machine), where the papers were tied into bundles. An employee represented by the Mailers' Union historically had jurisdiction over the wire machine during the run of the "Country" edition. After the papers were tied, they proceeded past the tying machine to a conveyor belt. "Area men," represented by the NMDU, historically had assignment of work in the area between the tying machine and the loading bay. They were responsible for operating diverters on the conveyor belt, which directed bundles of newspapers to the appropriate truck for loading. The area man would also clear any jams on the belt and pick up bundles that fell off the conveyor belt. If, however, an employee represented by the Mailers' Union was closer to the fallen or logjammed bundles, he would pick them up or clear the conveyor belt instead. Besides operating the diverters, the area man also filled out a departure sheet for the delivery trucks.³

In the new Jersey City facility, however, overhead grippers will move papers along from the pressroom to the mailroom. New machines will automatically count the newspapers. The conveyor belts running from the tying machines will move continuously in a system called "direct out" through the windows of the mailroom to the trucks on the loading dock. There is no need for an employee manually to divert bundles to the appropriate truck.

During the Employer's first run of its "Country" edition on the new system, the Employer refused to assign an NMDU-represented area man. A malfunction caused bundles of newspapers to fall off the conveyor belt between the tying machine and the windows to the loading dock. On that day, employees represented by the Mailers' Union picked up the bundles and stacked them on the floor.

NMDU Business Agent James DeMarzo told Foreman Lawrence Arenson that stacking the bundles was

¹ All dates are in 1996 unless otherwise noted.

² The "Country" or "National" edition is the edition destined for delivery outside the New York Metropolitan area.

³ On some editions, but not on the "Country" edition, the area man also functioned as a clocker who counted bundles on the belt.

NMDU work and not Mailers' Union work. Arenson responded that the Mailers were on the strapping (tying) machine and that whoever was on the machine would pick up the papers. After the malfunction was corrected and the belt started, DeMarzo stopped it and caused papers to fall on the floor of the mailroom. DeMarzo said, "I'm not going to let these papers go out until I get an area man." Arenson again started the belt and told the employees represented by the NMDU to load the trucks or they were fired. DeMarzo shut down the belt, the employees represented by the NMDU did not load the trucks, and the "Country" edition was canceled that night.⁴

B. Work in Dispute

The disputed work involves picking up fallen bundles of the "Country edition" newspapers and clearing logjams on the conveyor belt at a point past the tying machines inside the mailroom of the Employer's new facility located in Jersey City, New Jersey.⁵

C. Contentions of the Parties

The Employer and the Mailers' Union contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the work in dispute should be awarded to employees represented by the Mailers' Union. They argue that it is more efficient to assign the disputed work to employees represented by the Mailers' Union because the functions performed by the NMDU-represented area man at Brooklyn will not be performed at Liberty View, there are employees represented by the Mailers' Union at the tying machine during the "Country" run, and there will be no need to assign an NMDU-represented employee to the area proximate to the tying machines. The Employer also contends that area and industry practice favor awarding the work in dispute to employees represented by the Mailers' Union. The Employer further argues that neither the collective-bargaining agreement nor prior

Board decisions favor awarding the disputed work to employees represented by the NMDU.

The NMDU contends that based on its collective-bargaining agreement, the past practice with respect to the manning of the "Country" edition in Brooklyn, and the area and industry practice, the work in question should be awarded to the employees represented by the NMDU.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claim and that there are competing claims to disputed work between rival groups of employees.

On the night of March 25, the Employer refused to assign an "area man" represented by the NMDU, and employees represented by the Mailers' Union picked up bundles which built up on the conveyor belt when the belt malfunctioned. NMDU Business Agent James DeMarzo stated that stacking the bundles was NMDU work and not Mailers' Union work, stopped the conveyor belt, and said that he was not going to let the papers go out until he got an area man. Based on this evidence, we conclude that there are active competing claims to the disputed work between rival groups of employees, and we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

Although, as noted above, a dispute between the NMDU and the Employer was referred to arbitration, the Mailers' Union has not agreed to be bound by that arbitration award.⁶ Thus, we find that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

⁴In accordance with its contract, the Employer on March 26, 1996, contacted Dean John Feerick and requested arbitration of its claim that the NMDU on March 25 violated the no-strike provisions of its collective-bargaining agreement. The NMDU filed unfair labor practice charges with the National Labor Relations Board alleging that the Daily News, L.P. unlawfully changed its working conditions by removing area men from the conveyor belt system without notice to or bargaining with the NMDU. On June 7, 1996, the Regional Director for Region 29 issued a letter deferring this charge to the grievance-arbitration machinery of the applicable collective-bargaining agreement. On August 1, 1996, Dean Feerick issued an Opinion and Award finding that the NMDU had violated the no-strike provision of its collective-bargaining agreement, but declined to "express a view, one way or another, on the correctness of the Publisher's decision not to assign an area man or the manner by which it went about implementing that decision."

⁵This definition is somewhat narrower than that in the notice of hearing in that it limits the issue to the "Country" edition. It also simplifies the definition set forth by the hearing officer.

⁶As noted at fn. 4 above, the arbitration award decided only that the NMDU had violated the no-strike provision of its collective-bargaining agreement.

1. Certification and collective-bargaining agreements

There is no Board certification involving the work in dispute.

The Employer has collective-bargaining agreements with both Unions. Each Union claims that its contract covers the work in dispute, which essentially involves clearing logjams on the belt and picking up fallen bundles.

Article III of the Employer's contract with the NMDU provides that the employees it represents shall perform numerous functions, including being "in charge of bundle conveyor outlets." When the "Country" edition was produced in the Brooklyn facility, an NMDU-represented employee was assigned to the area between the tying machine and the loading bay to divert the bundles to the appropriate truck loading bay. That employee would also pick up fallen newspaper bundles or clear jams on the conveyor belt past the tying machine.

Article VII of the Employer's contract with the Mailers' Union defines the work of Mailers' Union-represented employees as "work presently performed by employees within the bargaining unit and new or additional work that is substantially the same or related." Employees represented by the Mailers' Union have performed the tasks of clearing logjams on the conveyor belt and picking up fallen bundles if the bundles fell closer to them than to employees represented by NMDU.

We find that both contracts arguably cover the work in dispute.⁷ Accordingly, this factor does not favor awarding the work in dispute to either group of employees.

2. Employer preference

The Employer prefers that the work in dispute be performed by employees who are represented by the Mailers' Union. Accordingly, this factor favors awarding the work in dispute to the employees represented by the Mailers' Union.

3. Employer past practice

When the "Country" edition was produced in the Brooklyn facility, an NMDU-represented employee was assigned to the area between the tying machine and the loading bay as an "area man" who was responsible for diverting the bundles to the appropriate truck loading bay and recording the departure time of

the trucks. The area man would also pick up fallen newspaper bundles or clear jams on the conveyor belt past the tying machine. If, however, an employee represented by the Mailers' Union was closer, he would pick up the fallen bundles or clear the logjam. Thus, both groups of employees have previously picked up fallen bundles of papers and cleared logjams. Even if these tasks were incidental to the Mailers' Union-represented employees' other tasks, the evidence indicates that performance of the work in dispute was part of their job responsibilities. Accordingly, we find that this factor does not favor awarding the work in dispute to either group of employees.

4. Area and industry practice

Until 1992, Kenneth Motto, an employee represented by the NMDU, worked at the New York Times 43d Street facility as an area man between the wire machine and the outside, primarily breaking up logjams of bundles in the multilevel conveyor belts. When Motto visited that facility in 1995, an NMDU-represented area man continued to perform that work. At that time, Motto also observed that at the New York Times Edison facility, a state of the art facility, an employee represented by the NMDU stationed on a catwalk functioned as an area man to police the conveyor system leading from the wire machine to a tray system. At the New York Times Carlstadt facility, the policing of the conveyor belts from the wire machine to the loading dock was done by employees represented by NMDU. At the New York Post, an employee represented by NMDU performed as an area man between the tying machine and the windows. That employee's sole job was to watch the bundles and to prevent "logjams" on the belt.

NMDU Assistant Secretary/Treasurer James Larkin worked at both the 43d Street and Carlstadt plants of the New York Times from 1983 to 1991. His experience included working as a "half-man," i.e., stationed between two presses to replace fallen bundles and break up jams. Larkin further testified that at the New York Times the area man's jurisdiction began at the wire machine.

Mailers' Union Business Agent Wayne Mitchell testified that at the New York Times 43d Street facility four employees, known as "horn men," who are represented by the Mailers' Union, are stationed beyond the wire machines and before a cross belt, also known as the drivers belt. These "horn men" are responsible for taking bundles off the conveyor belt in case of jams, placing bundles on the floor, and holding back bundles to handle bundle traffic problems. Mitchell also testified that at the New York Post, the NMDU area man was not stationed inside the mailroom but outside watching the outside conveyor belts.

⁷ Where both unions have valid contractual claims to the disputed work, "this factor favors assignment of the work to neither party; in effect, the conflicting contractual claims neutralize each other." *Teamsters Local 996 (Kapiolani Medical)*, 268 NLRB 1071, 1072 (1984), citing *Iron Workers Local 8 (PPG Industries)*, 267 NLRB 748 (1983), and *NLRB v. Graphic Arts Union No. 1P*, 600 F.2d 336 (2d Cir. 1979).

The evidence regarding area practice is inconclusive. There is no further evidence as to industry practice outside the New York/New Jersey area. This factor does not favor awarding the work in dispute to either group of employees.

4. Relative skills

The only skill required in performing the work in dispute is the lifting by hand of newspaper bundles from the conveyor belt, stacking newspaper bundles on a table or floor, or picking newspaper bundles up off the floor. This factor does not favor awarding the work to either group of employees.

5. Economy and efficiency of operations

The conveyor belt outlets are located in the mailroom. It is obviously more economical and efficient to assign the task of replacing fallen bundles back onto the conveyor belt to employees represented by the Mailers' Union who, unlike NMDU-represented employees, are located in the mailroom and have jurisdiction over the tying machine for this edition. Otherwise, an employee represented by the NMDU would have to come inside the mailroom each time a problem occurred or remain there with no other function than to watch and wait for problems to occur on the conveyor belt. This factor favors awarding the work to employees represented by the Mailers' Union.

Conclusion

After considering all the relevant factors, we conclude that employees represented by New York Mailers' Union No. 6, Printing, Publishing and Media Workers Sector of the Communications Workers of America, AFL-CIO are entitled to perform the work in

dispute. We reach this conclusion relying on employer preference and economy and efficiency of operations. See *Newspaper & Mail Deliverers' Union of New York (Daily News)*, 321 NLRB 684 (1996). In making this determination, we are awarding the work to employees represented by the Mailers' Union, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Daily News, L.P. represented by New York Mailers' Union No. 6, Printing, Publishing and Media Workers Sector of the Communications Workers of America, AFL-CIO are entitled to perform the work on the Country Edition related to being in charge of bundle conveyor outlets at a point past the tying machines, along the conveyor belt system, including replacing fallen bundles back onto the conveyor belts inside the mailroom, located at the Employer's new facility, located in Jersey City, New Jersey.

2. Newspaper and Mail Deliverers' Union of New York and Vicinity is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Daily News, L.P. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Newspaper and Mail Deliverers' Union of New York and Vicinity shall notify the Regional Director for Region 29 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.